WHY DC STATEHOOD IS CONSTITUTIONAL

For decades, residents of Washington, D.C. have been fighting to be fully represented in Congress - to gain statehood. Championed by Delegate Eleanor Holmes Norton and Senator Tom Carper, H.R. 51/S.51 would make Washington, D.C. the fifty-first state via simple legislation. Statehood would grant representation in Congress to nearly 700,000 mostly Black residents - including 30,000 veterans - and provide them with the same participation in our nation's democracy as every other American enjoys.

> **"...making Washington, D.C. the fifty-first state is not only constitutional but squarely within the powers delegated to Congress."**

Despite strong support both inside and outside the Beltway, there are those who bank their opposition to D.C. statehood in questioning its constitutionality. In May 2021, nearly 40 constitutional scholars came together to respond to those arguments in a letter addressed to congressional leadership. The letter explains in clear language that making Washington, D.C. the fifty-first state is not only constitutional but squarely within the powers delegated to Congress.

The Admission Clause

The Admission Clause (Article IV, Section 3) provides the basis for Congress' ability to make states. The Clause gives Congress complete "...authority to admit new states into the Union by whatever means it considers appropriate..."[1] Making a state is not a new exercise of power for Congress - they've done it 37 times before with each of the states admitted to the Union after the original 13 colonies. And each new state has been admitted by congressional action - *never* by constitutional amendment.

In 1791, Maryland ceded the land that is now Washington, DC to the federal government. In doing so, they relinquished all authority over the land, making it the "exclusive jurisdiction" of Congress and the government of the United States.[2] [As Viet D. Dinh, who served as an Assistant Attorney General during the presidency of George W. Bush, has explained, because Maryland's cession of the territory now constituting the District was full and complete, it severed D.C. residents' now far distant "political link with" Maryland.][3] The current District is not part of Maryland, and Maryland has no claim to any portion of the District's territory. As such, there is no need to require Maryland's consent for the establishment of a new state. Congress' passage of S.51 would be well within their enumerated powers to create a new state.

> **"Congress has admitted 37 states into the Union – never by constitutional amendment."**

1 Luis R. Davila-Colon, Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis, 13 Case W. Res. J. Int'l L. 315, 317 (1981).

2 Prepared Statement of Viet D. Dinh, Before the Committee of Homeland Security and Governmental Affairs of the United States Senate (Sept. 14, 2014) ("Dinh Statement") (quoting 2 Laws of Maryland 1791, ch. 45, § 2 (Kilty 1800), quoted in Raven-Hansen, The Constitutionality of D.C. Statehood, 60 Geo. Wash. L. Rev.,60 Geo. Wash. L. Rev. 160, 179 (emphasis added) (1991).

3 As Dinh has further explained, the formation of the State of Ohio provides a direct precedent. A portion of what, in 1802, became Ohio had previously been part of Connecticut. But, because Connecticut had unqualifiedly ceded the territory at issue to the United States (just as Maryland ceded the territory now composing the District), Congress did not require, and did not seek, Connecticut's permission when it approved Ohio's admission to the Union. Dinh Statement, supra (citing The Enabling Act of 1802, 2 Stat. 173 (1802); 5 The Territorial Papers of the United States 22-24 (Clarence Edwin Carter ed., 1934)); see also Raven-Hansen, supra, at167-69 (same).

The District Clause

The District Clause (Article 1, Section 8) gives Congress power to exclusively govern "...over such District (not exceeding ten Miles square) as may become...the Seat of the Government of the United States."[4] Some critics argue that the District Clause mandates that the size of the District cannot be changed. But that's not the case. The Clause simply gives a maximum size that the District cannot exceed - it does not speak to how small it can be. In fact, the size of the District has been changed before. In 1791, Congress altered the District's southern boundary to encompass portions of what are now Alexandria, Virginia and Anacostia. Then, in 1846, Congress retroceded Alexandria and its environs back to Virginia.[5] As a result, the territory composing the District was reduced by a third. S.51 operates within the constitutional boundaries imposed by the District Clause: it would reduce the size of the seat of the government so that it only includes the Capitol Building, the White House, the National Mall, the Supreme Court and the Federal executive, legislative, and judicial office buildings located adjacent to the Mall. The remaining land would be formed into the new Washington, Douglas Commonwealth, still granting Congress complete authority over the remaining federal district.

The Twenty-Thrid Amendment

Ratified in 1961, the Twenty-Third Amendment provided Washington, D.C. the ability to participate in presidential elections by granting three electoral college votes. Statehood opponents have suggested that the amendment poses a barrier to Congress' admission of D.C. to the Union. In fact, the amendment is entirely silent on the subject. The only question asked by the amendment is a practical question - not a constitutional one: How to address the provision that assigns presidential electors to what will become a shrunken seat of government, with virtually no residents?

S.51 addresses this practical question by including multiple provisions aimed at resolving the matter. In one section, the bill provides for the repeal ofthe provision of federal law that establishes the mechanism for District residents to participate in presidential elections. In 1961, following the adoption of the Twenty-Third Amendment, Congress exercised its enforcement authority by enacting legislation (codified at 3 U.S.C. § 21), providing that District residents may select presidential electors; the votes of the electors are currently awarded to the ticket prevailing in the District's presidential election. In another provision, the bill provides for the expedited process for repealing the Amendment itself - a process that should move forward to ratification swiftly and successfully once the Commonwealth is admitted as a State. None of the other 50 States has reason to seek to retain three electors for a largely unoccupied seat of government.

Statehood Is Constitutional

The decision to admit a state falls squarely within the powers granted to Congress. Historically, the Supreme Court has long avoided judging disputes based on matters that the Constitution makes the sole responsibility of the coordinate, elected branches. Additionally, it's unlikely that anyone would have standing (or cause) to bring such a case.

Support for statehood has increased significantly over recent years, and despite arguments to the contrary, legal scholars agree and acknowledge that statehood and S.51 are constitutional. The lack of representation of nearly 700,000 Americans goes against the foundation of our democracy - and Congress has the power to correct this injustice. The Senate should correct this injustice and pass statehood so that our democracy can finally be fully representative.

4 U.S. Const. art. I, § 8, cl. 17.

5 See An Act to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, ch. 35, 9 Stat. 35 (1846).